HO TECK FAH v. LOOI WAH t/a LOOI CONSTRUCTION

[O.C.J. (Wan Yahya J.) May 29, 1980]
[Malacca — Civil Suit No. 150 of 1975]

Damages — Injuries to cervical spine — Paralysis from waist downwards.

Tort — Negligence — Statutory duty to provide safe system of work.

Labour Law — Statutory duty — Negligence — Whether premises a factory — Building operations — Failure to keep ladder in non-slippery condition — Factories and Machinery (Safety, Health and Welfare) Regulations, 1970, reg. 12 & 38(3) Civil Law Act, 1956, s. 12 — Factories and Machinery Act, 1967, ss. 2, 3 & 47.

The plaintiff, a 30 year old skilled carpenter was employed by the defendant. On March 4, 1974 while engaged in fixing the roofing of a factory in Ayer Keroh, Malacca he fell down and sustained serious injuries. As a result of the injuries to his cervical spine he became paralysed waist downwards and was confined to the wheel chair. His medical report indicated that his injuries were of a permanent nature and that he was unlikely to use his lower limbs and it was obvious that he would never walk again. The court found (1) the defendant was the occupier of the premises and that he had both physical possession and control over the area where his workmen, i.e. the plaintiff, was working at the time of the accident; (2) the plaintiff was employed as a manual labourer in a factory and as such the defendant owed him a statutory duty to provide measures towards safeguarding his safety; (3) the plaintiff had proved the defendant had breached his statutory duty; (4) the plaintiff was liable for 40% contributory negligence. The court awarded:

i)	Special Damages as agreed	$ 27,365.00
ii)	For pain and suffering and loss of amenities as agreed	70,000.00
iii)	Total loss of true earnings calculated at $240.00 p.a., calculated by 20 years multiplier	35,895.00
	Total at 100% liability	$133,260.00

As the court assessed his contributory negligence at 40% the plaintiff would only recover 60% of the total award which amounted to $79,956.00. In addition, the plaintiff was allowed interest and costs at the usual rates.

CIVIL SUIT.

A.C. Vohrah for the plaintiff.

Tee Eng Tuan for the defendant.

Cur. Adv. Vult.

Wan Yahya J.: The plaintiff, a 30 year old skilled carpenter, was employed by the defendant. On March 4, 1974, while engaged in fixing the roofing of a factory in Ayer Keroh, Melaka, he fell down and sustained serious injuries. As a result of the injuries to his cervical spine he became paralysed waist downwards and was confined to the wheel chair. His latest medical report indicates that his injuries were of a permanent nature and that he is unlikely to regain the use of his lower limbs and it is obvious that he will never walk again. In his latest medical report dated October 13, 1978 the examining doctor gave the following prognosis:

"The patient has paralysis of his lower body. He has bowel and urinary incontenance. In view of no improvement since his accident 4 years ago, the chances are the above features will be permanent. He will be able to move around on a wheel chair."

In his amended statement of claim the plaintiff attributed the cause of the accident to the defendant's failure to provide the plaintiff with a harness to prevent him from falling, a scaffolding to secure a firm hold or a net to break and render harmless his fall. Further and in the alternative the plaintiff alleges that the accident was caused by a breach of statutory duty by the defendant to provide a safe system of work.

The defendant avers that the accident was solely caused by, or substantially contributed to, the negligence of the plaintiff himself. In the amended statement of defence he contended that the Factories and Machinery (Safety and Welfare) Regulations, 1970 were not applicable. Further and in the alternative he averred that the equipments or safety devices which the plaintiff claimed he had failed to provide or use were impracticable, unnecessary and/or not suitable for the nature of the plaintiff's work.

A claim for personal injury of this nature normally involves two elements, i.e., common law and statutory negligence, but, as the plaintiff had indicated at the end of the hearing that he was relying on statutory negligence alone, there is no need for discussion on the other aspect of his claim.

For the plaintiff to succeed in this case he has to satisfy the court firstly that the defendant was an occupier of the premises within which the plaintiff was injured. Section 3 of the Factories and Machinery Act, 1967 (hereinafter referred to as 'the Act') defines an occupier in relation to a factory as a person who occupies or uses any premises as a factory.

It was submitted to me that the mere presence of the defendant at the premises for a temporary period for the purpose of carrying out his contractual obligations did not make him an occupier within the meaning of the definition in section 3. In my opinion a person who has physical possession and control over the premises envisaged in the above definition, whether temporarily or permanently, is an occupier for the purpose of the Act. If the nature of his contract involves intermittent ingress or periodic occupation of the premises, then he must be taken as an occupier during the period of such occupation and in respect of such portion of the premises over which he had physical possession and control. I am satisfied from the evidence that the defendant was the occupier of the premises and that he had both physical possession and control over the area where his workmen, i.e. the plaintiff, was working at the time of the accident.

Secondly, the plaintiff must show that the defendant had breached his statutory duty under the Factories and Machinery Act, 1967 or the Factories and Machinery (Safety, Health and Welfare) Regulations, 1970. It was argued by the defendant that the premises on which the plaintiff was then working were not used as a factory within the meaning of the Act and therefore the law would have no application against him. Section 2 of the Act interprets the term 'factory' as any premises or part of a premises where —

"(a) within the close or curtilage or precincts of such premises or part thereof persons are employed in manual labour in any process for or connected with or incidental to the making, altering, repairing, ornamenting, sorting, finishing, cleaning, washing, breaking, demolishing, constructing, re-constructing, fitting, refitting, adjusting or adapting of any article or part thereof; and

(b) such work is carried on by way of trade for the purposes of gain or incidentally to any business so carried on"

and (whether or not they are factories by reason of the foregoing definition) the expression 'factory' also includes the following premises in which persons are

employed in manual labour, that is to say —

"(x) any premises, place or space where any building operations or work of engineering construction are carried out."

It is perceivable from the above that the definition of factory is not confined to the narrow terms couched within the description in paragraph (b) of subsection (1) of that section but would include the other places of trade, business or work as particularly mentioned in paragraphs (i) to (xi) of subsection (b). The one that applies in this case is paragraph (x) above.

The next point to be considered is whether the act of fixing Ardex asbestos roof to a factory is in this law a building operation. The answer lies in section 3 of the Act, which reads:

"'building construction' means the construction, structural alteration, repair or maintenance of a building...."

In my view this definition is wide enough to accommodate works involving replacement of roof or fixing of roof materials to a new or existing factory. For these reasons I hold that the plaintiff was employed as a manual labourer in a factory and as such the defendant owed him a statutory duty to provide measures towards safeguarding his safety.

In order to ascertain the extent of the statutory breach complained of, it would be necessary to consider the nature and conditions of the plaintiff's work. It was established from the evidence that the plaintiff was working on the roof at a height of between 25 to 30 ft. from the ground; that except for a step ladder made of a piece of plank 9 inches wide, with strips of wood nailed across, there was no other material on which he could secure his foothold or with which he could have a firm hold. According to him the Ardex roofings are in actuality asbestos sheets and as such brittle and could not support his weight if he were to step on them. His whole weight, as he carried out his job, therefore must be borne by the step ladder. It was not disputed that there was no rope, nets or any other safety device of any kind. The plaintiff's job was to squat on the step ladder and, after receiving the asbestos sheets from a worker standing on some kind of platform, affix them on to the framework of the roof. Whilst thus engaged, he said he slipped from the wet and slippery ladder and plummetted down 25 feet or so to the ground.

I shall deal first with the alleged statutory duty, which the plaintiff's counsel submitted, is provided for in regulations 12 and 38(3) of the Regulations. Regulation 12 reads:

"12. Where any person is required to work at a place from which he will be liable to fall a distance of more than ten feet, means shall be provided to ensure his safety and such means shall where practicable include the use of safety belts or ropes."

The question to be considered here is whether securing the plaintiff to one end of a rope or to a safety belt, or rigging up a net to catch him if he falls, constituted practicable measures envisaged by the Regulations. Evidence has been introduced by the defendant and elicited from the plaintiff's witnesses to say that such measures are unheard of in the building construction business and are certainly cumbersome and impracticable. It was submitted that far from ensuring his safety, it could hinder his movements and make it impossible for him to carry out his task. Similarly the use of a net to catch his fall would entail not only the use of a large firm type of netting material but would involve a sound construction to hold the network all around the building. Such a scheme, to my mind, would not only offset the cost of construction and make it impracticable but would, in effect, turn the entire construction area into some kind of a circus ring. I find myself in entire agreement with the defence insofar as the proposed use of the safety belt and net is concerned, but, as for the rope, I am of the view that, although having it secured to the worker is not practicable, it could still be secured on one end to the topmost part of the roof and allowed to hang alongside the workers so as to give the worker working at such a height something to hold on when he wished to stand up or move from one place to another. The step ladder itself, which was described as 9" in width only, was, to my mind, quite inadequate to satisfy the standard of safety required by these Regulations. I find therefore that the plaintiff had proved breach of statutory duties of these two regulations.

The other breach alleged by the plaintiff relates to the condition of the step ladder. According to him, he found it wet and slippery before his fall. The defendant, on the other hand, suggested through cross-examination that it was not so. As the plaintiff was the one who was on the roof and had seen the condition, and there being no other evidence introduced to the contrary, I accept the plaintiff's testimony that the step ladder was wet and slippery either from the early morning dew or rain that might have fallen during the previous night.

Failure to keep the ladder in a non-slippery condition is a breach of statutory duty as prescribed under section 10 of the Act itself, which ran as follows:

"10. Without prejudice to the provisions of any law with respect to local authorities, in respect of any factory, the following provisions relating to safety shall apply —

....

(c) All floors, working levels, platforms, decks, stairways, passages, gangways, ladders and steps shall be of safe construction so as to prevent a risk of persons falling, and structurally sound so as to prevent a risk of collapse, and shall be properly maintained and kept, as far as reasonably practicable, free from any loose material and in a non-slippery condition."

By failing to inspect and render the step ladder in a non-slippery condition the defendant had breached yet another statutory duty.

Having decided the defendant liable for breach of statutory duty I will have to decide whether the plaintiff's claim is in any way reduced by contributory negligence. I am unable to agree with counsel for the plaintiff's submission that contributory negligence does not arise in liability through breach of statutory duty. Section 47 of the Factories and Machinery Act, 1967 read with section 12 of the Civil Law Act establishes clearly its application to this type of negligence.

To determine this question it is necessary to revert once more to the evidence of the plaintiff. Although at first he claimed that he was in a squatting position when he slipped and fell, he agreed in cross-examination later on that, after tightening a screw, he stood up, lost his balance and fell. Now the plaintiff was aware that he had a step ladder 9 inches wide to keep his foothold on, he knew that this ladder was wet and

slippery and that there was no other support or any form of safety device to prevent him from falling. Yet he had chosen to continue to work on it although he could have refused to work if he had wanted to, or taken any measures to ensure that it was safe for him to continue with his job. He did nothing to minimise these risks and neither did he draw the defendant's attention to these existing perils. Instead of proceeding cautiously, which he could have done by keeping his hands and legs on and crawling along the reclining step ladder, he had chosen to stand up. He must have been aware for some time then that the step ladder was slippery as he started work at 8 a.m. and the mishap occurred at 9 a.m. I am unable to accept that during the one hour or so when he was working, he was not aware of the condition of the step ladder. I therefore hold that the plaintiff was liable for 40% contributory negligence .

I award special damages as agreed between the parties at $27,365. For pain and suffering and loss of amenities I allow the agreed sum of $70,000. As for the loss of future earnings the plaintiff was 30 years old at the time of the accident. Although he has lost the use of both his legs, he had regained complete mobility of his upper limbs after treatment. He was by profession a skilled carpenter before the accident and as such could still rely on his skilful hands for limited future earnings by doing wood-crafts such as wooden stools, bread boards and other small utility items and furniture. I would assess his capacity to earn in future to be reduced to about 20% of his former earnings, which the parties appear to have impliedly agreed at $300 per month. The total loss of future earnings in this case therefore will be $300 minus $60, i.e. $240 per month, which, when calculated by 20 years multiplier — a factor I deem fair — will give a resulting award of $35,891.16. For the purpose of this claim, I shall round off the amount to $35,895. The total awards to the plaintiff, assessed at 100% liability, add up to $133,260. I have assessed his contributory negligence at 40%. He will, therefore, be able to recover 60% of the total award, which will work out to $79,956. In addition, the plaintiff is allowed interest and costs at the usual rates.

Order accordingly.

Solicitors: *Vohrah & Tan Chee Lan; Syarikat Richard Ho.*

SHAMSIAH BINTI IBRAHIM v. ATTORNEY-GENERAL & ORS.

[O.C.J. (Yusoff Mohamed J.) June 9 ,1980]

[Johore Bahru — Petition for Admission No. 34 of 1979]

Legal Profession — Admission as Advocate and Solicitor — Objection by Bar Council and Bar Committee — Notice of objection not served on petitioner — Petitioner receiving remuneration for paid leave during period of pupillage — No special leave required — Legal Profession Act, 1976, ss. 12, 14, 15 & 16.

In this case the Bar Council and the Johore Bar Committee objected against the admission of the petitioner on the ground that during her period of pupillage the petitioner was an employee of the State Development Corporation and received remuneration for paid leave while doing her pupillage. No notice of objection was served as required three clear days before the date of the hearing of the application.

Held: (1) the objection must be overruled as notice of objection had not been served as required under section 16(2) of the Legal Profession Act, 1976, three clear days before the date of the hearing of the application;

(2) in the circumstances of the case where the petitioner had been given paid leave from her employment, no special leave of the Bar Council was required.

PETITION FOR ADMISSION.

Arthur Lee for the petitioner.

Abas Ismail Rowland for the Attorney-General.

S. Balarajah for the Bar Council and the Johore Bar Committee.

Cur. Adv. Vult.

Yusoff Mohamed J.: An objection was taken by the Bar Council and the Johore Bar Committee against the admission of the petitioner by reason that section 12(3) of the Legal Professions Act (Act 166) has not been complied with.

Section 12(3) of the Act provides:

"No qualified person shall, without the special leave in writing of the Bar Council, hold any office or engage in any employment of any kind, whether full-time or otherwise, during the period of pupillage, but nothing in this subsection shall preclude a pupil from receiving remuneration from his master."

It was contended by the Bar Council and the Bar Committee that the petitioner during her period of pupillage has held office or engaged as an employee of the State Development Corporation, in that she was receiving remuneration (paid leave) while doing her pupillage.

I overruled this objection for the following reasons:

(1) That the notice of objection as required under section 16(2) has not been served on the petitioner nor a copy of it filed in the Registrar's Office at the Court, 3 clear days before the date of hearing of the application. In my view this provision of the Act is mandatory having regard to subsection (3) of section 16 which in effect provides that upon a notice of objection having been filed, the court of a single judge would have no jurisdiction to entertain the application.

It is also my view that section 16 of the Act does not envisage an objection to be taken at the hearing on the present ground against the petitioner in view of the fact that a period of not less than 10 days was required by section 16(1) for copies of the petition and other documents exhibited to be served on the Bar Council, the Bar Committee and the Attorney-General before the petition was heard, and the fact that by that provision the Bar Council would have had sufficient time and opportunity to file the notice of objection as prescribed by the section.

(2) The reason given by the Bar Council on the matter objected upon in that, the petitioner receiving paid leave while doing pupillage was discovered only on the day before the petition was heard is to my mind flimsy, in view of section 16 stated above and also the duty required of the Bar Council and the Bar Committee to make full enquiries upon the petitioner 3 months before her admission (sections 14 and 15 of the Act) and during which time this matter would have been revealed. If the inquiries have been made it